



SARA Law Research Center

International Journal of Legal and Social Order, <https://www.ccdsara.ro/ijlso>

ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188

Nº. 1 (2025), pp. 223-230

# THE MEASURE OF LAW AS AN EXPRESSION OF THE LEGAL MEANING EMBEDDED IN CUSTOMARY LAW

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Received 11.12.2024; accepted 20.02.2025

First online publication: 27.02.2025

DOI: <https://doi.org/10.55516/ijlso.v5i1.249>

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## ***Abstract***

*Relying on the phenomenological approach to the Law the measure of law is problematized as an expression of legal meaning, of its qualities of ambivalence, contradiction, polyvariance, justice. Its genesis is in the customary law. Legal measure is an expression of social dependencies, it contains the pattern of law. It reflects the correct and fair distribution of goods, the expression of legal position subjects on the occasion of goods at a certain stage of human development.*

**Key words:** *measure of law; legal meaning; distributive function of the legal measure; customary law.*

## **INTRODUCTION**

As a spiritual phenomenon, law is a fact of human culture. It is a product of conscious social experience combined with extra-epistemic components - archetypes, innate patterns of thinking, primordial notions. Law (*Spataru-Negura, 2024, p.1*) is a phenomenon of consciousness, which is based on the social level of existence of each human community. The measure of law as a fundamental meaning and distributive property of law has its genesis in the distributive rules of the social mode of action. It has its root in customary law. The measure of law is that semantic phenomenon of OTP and FP that brings out and reconciles the opposing or unilateral positions of subjects in distributive and exchange relations to goods in the field of law.

## **I. THE APPROACH TO THE STUDY OF THE MEASURE OF LAW**

By regulating human activity, law has transformed social reality in relation to certain goals throughout the various stages of human civilization. Factuality in the study of society is related to the historicity of its existence and of its knowledge (*Fikovska, 2007, p. 40*). Civilization is first projected into the subject world. Maintenance precedes awareness. The first level of collective mode of action is totems and customary (*Ene-Dinu, 2023, p. 105*) law. In these, too, is present, albeit at an unconscious level, a primitive principle of unified action that covers distributive and exchange relations. Historical development consists both of essentially recurrent circumstances and of specific, unique events. The regularities and driving forces of social life, which the law legitimizes in the dimensions of legal measure, are not on the surface of the multiple and contingent manifestations of social existence. They are the expression of a historical cultural, value evolution that allows the transformation of law into an increasingly all-encompassing regulator of human behavior, of the establishment of a centralized power order. The legal measure measures the content of law. It is to define to each - his, to reduce the relativity of the general to the determinacy of the particular, the private, the individual-related. In the process of the operation of law, the legal measure reflects and measures the type and extent of protection of a legally significant good for subjects in view of the legal means of the legal system. Its root, the essence of the meaning-distributing property of law that concretizes legal meaning, is in the primitive rules of habitually recurring conduct in factually typical situations.

The philosophical-sociological meaning explanation of law that pervades the measure of law is the result of following a systematic extra-positivist phenomenological (*Husserl, 1977, p. 545*) approach. Seeking the meaning of law in the fact-fact relation, legal phenomenology concretizes and takes it into the measure of law. It concretizes the meaning of elements (norms, rights, commands, prohibitions) through the meaning of law, of the system. Phenomenology derives meaning in pattern - a phenomenon that sets, contains ready-made patterns and solutions in typical mass repetitive socially significant situations dictated by the joint life of people. Order precedes law, and through phenomenology, a juridical quality is given to social reality and patterns of social interaction. An approach of legal conceptualization, the phenomenology of law relies on the leading role of human consciousness, where man himself imposes actions and deeds by knowing and appreciating social reality. Man is meaning-knowing and meaning-making through the manifest forms of law.

## **II. THE LEGAL MEASURE FOLLOWS AND SPECIFIES THE LEGAL MEANING**

The measure of law has its root in customary law, argued through the fundamental meaning coordinates of law - goods and order (*Mihajlova, 2001, p. 7*). The legal measure expresses and follows the legal sense from due, ideality to

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concreteness. It points to the requirements of objective law directed to the individual consciousness of subjects. It contains the quantitative-qualitative measured power in the distribution and exchange of the utility of goods. In view of the legal measure, it sets the conditions of the order of law in their volume, which presuppose the corresponding legal quality. The measure of law delineates the volume and type of legal power set by objective law according to the specificity of social relations, the type of goods and the degree of socio-economic development. The legal measure has its meaningful root in customary rules of conduct and reflects the degree of evolution of human social development. The beginnings of the first rules are in the rules of fact (*Hayek, 1996, p. 95*), in individual actions that are ascertained as social -significant community-facts. Maintenance precedes goal-setting. Consciousness prefigures the meaning embedded in law through sensory phenomena. The legal measure contains the actual phenomenology - social, ethical and normative - through which it prefigures and measures freedom for the subjects of law (*Mihajlova, 1996, p. 3*), carries the common law meaning antecedent of law.

The study of legal measure is part of a systematic approach to law. Systems rationality, as part of the explanation of law, relies on the fact that law is not the only normative system for regulating human behavior. Law enters into relations with other elements and systems with which it functions in a common social environment. These include history, archaeology, ethnology, and economics. Emphasis is placed on the argumentative - deliberate and meaningful - rationality of law, which depends on its usefulness to man and society. Utility is tied to goods and order. It is reflected in the measure of the right for certain behaviour set for subjects.

The meaning of law as a system, its value-purpose utility, is not only in the separate legal norm, nor only in its three-element structure. It is in the property of law to measure in a balanced and fair way the access of subjects to the goods of law, in the dimensions of the measure of law. The legal measure specifies the legal meaning, gives its integrity and objecthood, points to the limit of legally permissible conduct. It determines the identity and utility of law as a regulator, points to the boundary between the subject and others, between the state and the person. Participates in the justification of a number of principles such as the principle of legality, the principle of the rule of law.

Law comes from social life, it exists before it is laid down. The substance of law is a social meaning, a matrix and a code, which is the product of human existence, consciousness and evolution and does not depend on the will of any legislator. This meaning-constituting core of law is set for man, it is an expression of primordial dependencies, patterns of organization of social matter, in communication as a mode of social interaction in relation to goods (*Mihajlova, 2001, p. 109*). It is this meaning-building core that encodes the mutual positions of subjects that is the content of legal measure. We support the thesis that in its

original code law is not a norm but a position in relation to goods (*Sharankova, 2001, p. 56*). Since man exists in and through community the course of social relations relating to the distribution and exchange of goods takes place within the framework of order. Therefore, the key role is far from being that of the norm alone, although it is an indisputable component of law as a system. No less important is the legal position, which in its quantifiability gives the content and volume of the measure of law. Legitimately within law, the legal measure determines the way goods are to be possessed, carries and removes the pattern of bilateral commitment. The point of law, therefore, is to translate factual relations of dependence over goods between parties into meaningful, rightful, and justified positions within the legal order.

The legal measure reflects the relativity of legal meaning. It is directed to order in the social mode of human existence, in the New Time to value order in social interactions. The pattern of law is guided by the meaning (purpose) of law, which brings orderliness to the social life of people in their mutual and reciprocal positions towards goods.

Having arrived at the idea of the right-order-people, social consciousness imposes it on recurrent situations and formulates primary rules that receive their institutionalization through custom. The positions of the participants in social relations are drawn from social practice, they are bound by the measure of right, which contains the distributive characteristic of right.

Science is clear that the first form of superpersonal pattern in a society is custom, which is associated with rules about facts (*Hayek, 1996, p. 95*), evaluated as permitted-not permitted. The content of the idea of the order of law set by rules (norms) follows custom after behaviour is gradually evaluated, matched to the matrix model of law through language. The model of law for the semantic-phenomenological theory is the dialogue (discourse) as a matrix of law, as a mode of mutual action, which expresses its meaning. Public consciousness derives from the dialogical nature of the model of law, rules of conduct in typical situations. At a later stage in the development of human society, from the matrix of law that carries its meaning, rules are supplemented by the measured "how much". The rules receive their original and complete form, deriving the legal measure as a theoretical concept of the general theory of law.

Central to legal hermeneutic phenomenology is the question of the formation of the meaning of normative rules of conduct, of the meaning of legal positions in their qualitative and quantitative characteristics reflecting the measure of law. The original philosophical question of whether law is set or created by man receives a clear answer. The phenomenon of law is constructed by social consciousness. The meaning of law, precedes and sets the meaning of norms, of rights, duties, prohibitions, which express the differently embedded legal distributive measure with regard to the relations of counter-or reciprocity. A fundamental legal quality, the measure of law follows, conceptualizes and

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measures in a quantitative-qualitative form the regularities of the social mode of existence between people. The meaning of law is taken down and concretized with respect to the positions of subjects in view of the concrete good in the dimensions of the legal measure.

### III. GOODS ARE A CRITERION FOR THE MEANING OF THE LEGAL MEASURE

The law contains a position set by the social conditions of life towards the goods it regulates. By directing social relations as a form of interaction between people, law, through the legal measure, regulates relations between people, not relations between people and things (goods). A fundamental meaning-distributing property of law, the measure of law is explained by a notion of good. Legal regulation has as its object goods. The measure of law is the degree, type and extent of concretization of the legal possibilities for subjects that the legal order allows for access to goods. The social mode of existence also sets the customary rules. The specificity of goods is reflected in the formulas of law derived from human social practice. The different character of goods determines the characteristic of the measure of law - whether it permits, prohibits, punishes, restrains. The specificity of the Goods expression of social dependencies set and different legal interest of the subjects of law. Private goods are distributed and exchanged between individual subjects, satisfying their private needs and interests. Public goods serve to satisfy public interests and are directed towards the achievement of socially significant goals, are distributed and exchanged in a way that preserves the integrity of the community. In public law, the collective principle and the protection of order as a good is determinative.

We maintain that the goods are not in the right, but they are why it is necessary. The good is the value of the need directed to the person and the society. The legal measure is also good, harmony, rightness, justice, social order. The determinant of the legal measure is the utility of the goods for the subjects in their objective interactions. It is their content that is preordained for man, has its genesis in customary law. Legal measure prefigures the utility of goods in ready-made archetypes and customary rules. This is the substantive characteristic of the notion of good. The historical stage of development of social relations, the mode of production included, predetermine the range of legally relevant and regulated goods.

It deserves clarification that the good and the benefit of the good are different things. We are talking about substantive and legal properties of the concept of good. It is the useful result that can be exchanged, sold, transferred that is the legal substance of the good. It is the criterion of the measure of law as the fundamental concretizing meaning and distributive property of law. We maintain that although in antiquity law was entangled in factual relations and was not explicitly sanctioned, it was accepted and acted upon in the community and non-institutionalized goods were not irrelevant to law. Rather, the deepest essence of

law is spiritual, unified by a common center of collective consciousness. It is the law that brings forth and transforms social reality for specific purposes throughout the different periods of human civilization.

The measure of law justifies the utility of law as a meaningful, useful, necessary and specified social order for both the community and the subjects. The legislator does not invent, but prefigures, conceptualizes, generalizes, sets the patterns of what is socially significant for a group of social relations, bringing them to concreteness through the dimensions of the legal measure. It is particularly clear in private law, where the rules apply - "give to give, do to do". An expression of freedom and non-freedom, of dependencies between subjects suggested and derived from their social nature and from experience, the content of the legal measure is not arbitrary or abstract. It is a meaning-concretizing property of law that points to the distributive quality of law. The measure of law is an expression of the communal sense of order, utility and balance of social interactions, refracted through dependencies between subjects with respect to the goods of law.

#### **IV. THE MEASURE OF LAW CONCEPTUALISES THE RELATION DUE-EXISTING**

The measure of law is a definitive legal property that covers all law, it is embedded in every legal manifestation. The measure of law, besides being a distributive property of law, is due in each of its forms. The measure of law, with its genesis in customary rules of fact, makes the transition from psychosocial to conscious juridization of reality. Even when the objecthood of law is almost material, a gesture, a symbol, the measure of law does not lose its essence of due. Legal facts are also expressions of the due in law. They are typified, abstracted and measured and do not lose their quality of due. The measure of law which is present in the legal facts retains its quality of due.

We maintain that law and legal measure as a model of reality are expressions of a relation to reality, not reality itself. This attitude is a product of social consciousness, which derives social regularities embedded in the dimensions of the legal. Legal measure is added to social facts and dependencies in order to make sense of them and measure them in its own way. Through it, law juridicises (transforms) reality, making the existing-obligatory transition in view of a clear legal meaning.

The legal measure is not intended for a single and isolated case. It is a model-pattern against which legal cases are measured and to which they must conform. It contains stability with clear subject matter and content. It has a determining function for law because in its qualitative and quantitative expression it models typical features in relation to the cases and subjects of law. Its functions for law are to be a model, a due that is respected and a criterion by which the conformity between regulated and regulator is judged. In both cases, from due to existing and from existing to due, the legal measure has to achieve

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correspondence between them, to infuse the quantification of the behaviour of subjects (the legally due) into the existing. The measure of law has its genesis in the customary rules of law that precede the formulas of law for a kind of goods. The distribution and exchange of goods and the need for measurement in private law arise first in time as a reflection of their objectively bilateral character.

The distributive nature of law precedes the norms of and in law, it is primary to the peremptory nature of law (Dachev, 2004, p. 222). Law through the legal measure first validates and binds, completes the original meaning of things, of formulas derived and suggested by experience, and then obliges. The binding and institutionalization of law transforms the content-distributive property of law into a due.

In the same sense is the thesis about the essence of the legal norm. It contains in itself two different legal qualities, two different phenomena which are a reflection of the substance of law. One phenomenon is the obligatoriness, the imperative, the bindingness of the law in its entirety, a requirement for what exists to pass into what is due. The other indicates the measure, the volume, the right and useful conduct inferred, the content of the normative. Here the measure of law is key, it stands closest to the social model of law, it builds the measured legal content, and it is multivariate. It is determined by the mutual correlation of the positions of subjects in the distribution and exchange of goods. Both legal custom and jurisprudence bear this distributive nature of law, the expression of meaningful dependencies concretized by the unified distributive function of legal measure. It manifests itself in norms, in positions, in legal provisions, in normative prescriptions. It builds all the units of legal direction of human conduct because it follows a single substantive regularity expressed polyvariably.

### CONCLUSION

*The measure of law as a fundamental legal property contains a conceptual relation between people, derived and selected in a required or possible behaviour of subjects in social relations. It reflects the most ancient notion of social binding in the distribution and exchange of goods. Its root is in customary rules of fact. The measure of law contains the requirement of community order. It is a fundamental distributive property of law that shares the utility of goods for subjects, an expression of social regularities. It gives finality and concreteness to the meaning of law in the social mode of human existence.*

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